Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1493

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

EDGAR GILBERT MILLER - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

EDGAR GILBERT MILLER - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

May it please the Court:

The petitioner, Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky reversing the conviction of the respondent in the Warren Circuit Court at Bowling Green, Kentucky.

OPINIONS BELOW

The trial court rendered no written opinion in this case. Originally, the Supreme Court of Kentucky on January 31, 1978, rendered a decision affirming in part and reversing in part. That opinion is printed in the Appendix herein at pages 13-15. The respondent petitioned for rehearing, which was denied and a mandate was issued March 14, 1978 (printed at page 16 Ap-

pendix). Respondent filed a petition for writ of certiorari which was granted by the Supreme Court of the United States on October 2, 1978 (No. 77-6912, Appendix, page 17) directing the Supreme Court of Kentucky to reconsider its decision in the light of *Taylor* v. *Kentucky,* 436 U. S. —— (1979). The Supreme Court of Kentucky subsequently rendered its new decision on November 21, 1978 (Appendix, page 18).

The Commonwealth filed a petition for rehearing and modification, which was denied by the Supreme Court of Kentucky on January 3, 1979 (Appendix, page 19).

Petitioner then moved to stay execution and enforcement of the mandate for ninety days pending application for petition for a writ of certiorari to this Court, which motion was granted by the Supreme Court of Kentucky on February 2, 1979 (Appendix, page 20).

JURISDICTION

The Judgment of the Supreme Court of Kentucky was rendered on November 21, 1978 and Petition for Rehearing and Modification was denied January 3, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the Kentucky Supreme Court Misinterpreted and Misapplied to This Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. ——, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)?

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT, SECTION 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NOTICE TO THE COURT

The issue set out herein is similar to those presented to this court in the following cases:

1. *Kentucky* v. *Whorton*—No. 78-749, October Term, 1978, Certiorari granted January 8, 1979, and pending on merits.
2. *Kentucky* v. *Williams*—No. 78-1084, Miscellaneous January Term, 1979, pending on petition for certiorari.
3. *Kentucky* v. *Avery*—No. 78-1085, January Term, 1979, pending on petition for certiorari.
4. *Kentucky* v. *Brannon*—No. 78-750, October Term, 1978, pending on petition for certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent was tried and convicted of first degree robbery (Kentucky Revised Statutes 515.020(1)) (Appendix, page 21) and first degree assault (KRS 508.010 (1)(a) (Appendix, page 21), and sentenced to twenty years imprisonment on each charge to be served concurrently, in the Warren Circuit Court (Bowling Green, Kentucky). On appeal to the Supreme Court of Kentucky, the conviction of first degree robbery was affirmed and the conviction of first degree assault was reversed on the ground that all the elements of first degree assault were merged into the elements of first degree robbery in accordance with the Kentucky Supreme Court's previous opinion in *Sherley* v. *Commonwealth,* Ky., 558 S. W. 2d 615 (1977). The respondent at trial and on appeal asserted as one of eight grounds for reversal that he was entitled to a tendered instruction of presumption of innocence. (Appendix, pages 57-58). This issue was decided adversely to respondent's assertion without comment, the Kentucky Supreme Court citing *Taylor* v. *Commonwealth of Kentucky,* Ky. App. 551 S. W. 2d 813, Discretionary Review denied June 29, 1977. Respondent then filed a petition for a writ of certiorari with this Court, which was granted November 28, 1977. On October 31, 1978 (*Edgar Gilbert Miller* v. *Kentucky,* No. 77-6912), this Court vacated the Kentucky judgment and remanded the case to the Supreme Court of Kentucky for "*further consideration in light of Taylor* v. *Kentucky,* 436 U. S. —— (1978)."

The Supreme Court of Kentucky in accordance with the order of this Court entered a new judgment, reversing respondent's conviction (Appendix, page 18) based upon *Taylor* v. *Kentucky, supra,* and its decision interpreting *Taylor* via *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978). It is from this interpretation that petitioner, Commonwealth of Kentucky, brings this petition for a writ of certiorari.

TRIAL FACTS

Both respondent, here, and the primary prosecuting witness were named Miller (no relation to each other). Mona Miller testified that she was a secretary for the Sheet Metal Workers, did all the union's office work and that respondent came into her office on December 6, 1976 while she was washing the coffee pot in a bathroom (TE 70-115, Appendix 23-57). Sensing someone behind her, she turned and saw respondent with a gun pointing at her stomach. He was wearing a hat, expensive looking sunglasses, a little Hitler-type mustache and had on a tan coat. The mustache appeared to be false. She screamed, and respondent began to beat her with the gun about her head and hands. He required her to open the safe to give him a money bag containing money and checks. She recognized him instantly as a man who had come into the union office on two previous occasions. She remembered him because he had the same surname as she and lived on the same rural route number. He filled out an application form on one of those occasions (the form with his handwriting and signature were introduced into evidence),

and she had followed him on the one previous occasion behind his Cadillac which contained a bumper sticker which made uncomplimentary statements about someone's wife.

Mrs. Miller's beating resulted in her hospitalization for ten days. Introduced were her wedding band, which contained a dent in it, and her watch. Mrs. Miller's husband testified to her condition when he arrived after being called. A police officer testified as to her condition when he arrived. Respondent testified he went to Nashville, Tennessee that day and did not return until after dark, about 6:00 p.m. A Mike Caudill, however, testified respondent was in Caudill's store both in the morning between 8:00 and 9:00 a.m. and again between 4:00 and 5:00 p.m. In the morning, respondent purchased items on credit but paid Caudill back that afternoon. Ten witnesses testified for the prosecution. Respondent was the only defense witness.

The respondent tendered an instruction on the presumption of innocence and of reasonable doubt, which was refused (Appendix, pages 57-58).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has misinterpreted and incorrectly applied a prior decision of this Court. *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (rendered May 30, 1978) to the case at bar. In *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (rendered July 25, 1978) (certiorari granted by this Court January 8, 1979 and pending on the merits, No. 78-749, *Kentucky* v. *Whorton*), the Supreme Court

of Kentucky interpreted *Taylor, supra,* to mean that when an instruction on the presumption of innocence is tendered by the defendant and the trial court has refused to give such instruction, such failure constitutes reversible error as a violation of the Constitutional rights of the defendant.

After *this* Court had rendered its decision in *Taylor, supra,* the Kentucky Supreme Court promulgated an amendment to Kentucky Criminal Rule (RCr) 9.56,[1] effective July 1, 1978. But, a great number of cases were passing through the judicial machinery at various stages of review in which the prior law and rules were applicable and in which the lower courts, in accordance with prior Kentucky decisions, had refused to give an instruction on the presumption of innocence. This case is one of them.

This Court has ordered the Kentucky Supreme Court to consider this case "in light of *Taylor* v. *Kentucky,* 436 U. S. —— (1978)." (Supreme Court Order, October 2, 1978). Instead, the Kentucky Supreme Court has considered it in the light of *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978) and now on

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[1](1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant to be innocent of a crime, and the indictment (or other accusatory document) shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty (and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree)."

(2) The instructions should not attempt to define the term "reasonable doubt."

petition for writ of certiorari granted as *Kentucky* v. *Whorton,* No. 78-749, October Term, 1978.

Proof of the Kentucky Supreme Court's misinterpretation of *Taylor, supra,* is found in the language of the majority opinion in *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 at 632, 633, to wit:

> "The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added). 'We hold that *on the facts of this case*[4] the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.'
>
> Admittedly, the weight of evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's rights to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of other cases then in the process of

[4]On what other facts an appellate court might rest its decision we hesitate to guess.

> appeal in this state, Whorton's being but one of them.
>
> Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one. Yet Taylor contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. *To bring this discussion to a merciful end, we read Taylor to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error.* If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.
>
> The judgment is reversed with directions for a new trial." (Emphasis supplied)

The Kentucky Supreme Court has incorrectly interpreted *Taylor, supra,* to require automatic reversal in all cases where an instruction on the presumption of innocence is requested but refused. The Court has taken this position regardless of the particular case or the amount and quality of the evidence showing the guilt of the accused.

Certainly, this was not the intention of this Court in *Taylor, supra,* as interpreted by one of the dissenting opinions in *Whorton* v. *Commonwealth, supra.* Mr. Justice Clayton opined that *Taylor* was a singular abberation because of the peculiar facts therein.

Because the Kentucky Supreme Court has been confused in its interpretation of *Taylor,* this Court needs to grant certiorari in order to clarify the meaning of *Taylor* and to allow the state court to utilize a proper measurement in deciding whether the failure to give the presumption of innocence instruction is or is not required, or does or does not necessitate a new trial.

The Kentucky Supreme Court has ignored some of the significant differences between this case and *Taylor, supra.* In *Taylor,* the trial was essentially a swearing contest between two witnesses, the defendant and the prosecuting witness.

Here, although the defendant and the prosecuting witness were the only two persons present at the time of the robbery, there was substantial proof to support the prosecuting witness' story of the robbery. Her husband, who was called, found her bloody and beaten. Likewise, police officers who arrived on the scene corroborated her condition. Her ring and watch were damaged and illustrated the beating she received. The prosecuting witness' testimony that she recognized the defendant because he had been in the office before and filled out certain forms was corroborated by the introduction of the documents that the defendant had filled out.

The defendant's alibi that he was in Nashville, Tennessee until after 6:00 p.m., the date of the robbery, was considerably weakened by testimony of a small shopkeeper that the defendant was in his store that evening at an earlier period of time and paid cash for

items that he had purchased earlier that morning on credit.

Therefore, the quantity and quality of prosecution testimony to prove guilt was substantially greater than that found in *Taylor.* And, again, we do not have the additional combination of errors here that were discussed in *Taylor.*

The Supreme Court of Kentucky should have applied the Harrington-Chapman harmless error rule in determining whether the absence of a presumption of innocence instruction required reversal, and we request this Court to grant certiorari, so that it can give direction and clarification to Kentucky's court and to those in other states who find themselves similarly situated. *Harrington* v. *Cal.,* 395 U. S. 250 (1969), and *Chapman* v. *Cal.,* 386 U. S. 18 (1967).

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Court should grant a writ of certiorari in this case in order to rectify the misinterpretation and application by the Supreme Court of Kentucky of *Taylor* v. *Kentucky* with the case at bar.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
Commonwealth of Kentucky

BY: MARTIN GLAZER
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120 State Capitol
Frankfort, Kentucky 40601

Counsel for Petitioner

PROOF OF SERVICE

I, Martin Glazer, one of counsel for the Petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 28 day of March, 1979, to Honorable J. Vincent Aprile, II, Assistant Deputy Public Advocate, and Honorable M. Gail Robinson, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Kentucky 40601, Counsel for Respondent

Martin Glazer

MARTIN GLAZER
Assistant Attorney General

APPENDIX

RENDERED: JANUARY 31, 1978

SUPREME COURT OF KENTUCKY

SC-410-MR

EDGAR GILBERT MILLER - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Warren Circuit Court
Honorable J. David Francis, Judge
No. 17191 and No. 17192

MEMORANDUM OPINION PER CURIAM AFFIRMING IN PART—REVERSING IN PART

Miller was convicted of first-degree robbery, KRS 515.-020(1), and first-degree assault, 508.010(1)(a). His punishment was fixed at imprisonment for 20 years for each conviction. He was sentenced to imprisonment for a maximum of 20 years. He appeals and assigns eight errors.

On December 9, 1976 Miller forced a union official to open its safe and deliver money to him by beating her about the head and hands with a pistol. Thereafter and in order to accomplish his escape, he struck her at the base of the skull with the pistol. No further trauma was administered to the hands.

The instructions on first-degree robbery required the jury to believe that the theft was accomplished either by beating the official about the head and hands or while

armed with a deadly weapon. The verdict does not disclose whether the jury believed one or both alternatives.

The instructions on first-degree assault required the jury to believe that the official was beaten on the hands. The verdict discloses that the jury believed this.

Miller submits that he should not have been convicted of the first-degree assault charged because the beating upon which it was founded may not be eliminated as an essential element of the first-degree robbery charge. KRS 505.020. We agree. Shirley v. Commonwealth, Ky., ____ S. W. 2d ____ (decided November 18, 1977).

The other seven assignments of error are patently without merit and need not be discussed in detail. It is enough to refer counsel to: Taylor v. Commonwealth, Ky., 545 S. W. 2d 76 (1976); Owens v. Commonwealth, Ky., ____ S. W. 2d ____ (decided December 13, 1977); Bogie v. Commonwealth, Ky., 467 S. W. 2d 767 (1971); Taylor v. Commonwealth, Ky. App., 551 S. W. 2d 813 (Discretionary Review Denied June 29, 1977, Cert. Granted November 28, 1977); Merritt v. Commonwealth, Ky., 386 S. W. 2d 727 (1965); Wells v. Commonwealth, Ky., ____ S. W. 2d ____ (decided January 10, 1978); Davis v. Bennett's Adm'r., 279 Ky. 799, 132 S. W. 2d 334 (1939); Alcorn v. Commonwealth, Ky., 557 S. W. 2d 624 (1977).

The judgment of conviction of the charge of first-degree assault is reversed and the cause is remanded with directions to dismiss that charge. In all other respects the judgment is affirmed.

All concur.

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OPINION RENDERED: JANUARY 31, 1978

SUPREME COURT OF KENTUCKY

EDGAR GILBERT MILLER

v.

COMMONWEALTH OF KENTUCKY

File No. SC-410-MR

Appeal From Warren Circuit Court
Action No. Ind. #17191 and #17192

MANDATE—Issued March 14, 1978

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

March 14, 1978 Appellant's Petition for Rehearing Denied.

A Copy - Attest:

(s)Martha Layne Collins, Clerk

Issued: March 14, 1978

[LETTERHEAD OF SUPREME COURT OF THE UNITED STATES]
Office of the Clerk
Washington, D. C. 20543

October 2, 1978

Martin Glazer, Esq.
Assistant Attorney General
120 State Capitol
Frankfort, Ky. 40601

RE: Edgar Gilbert Miller v. Kentucky
No. 77-6912

Dear Mr. Glazer:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and case is remanded to the Supreme Court of Kentucky for further consideration in light of *Taylor* v. *Kentucky*, 436 U. S. ____ (1978).

Very truly yours,

Michael Rodak, Jr., Clerk

RENDERED: NOVEMBER 21, 1978

SUPREME COURT OF KENTUCKY

SC-410-MR

EDGAR GILBERT MILLER - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Warren Circuit Court
Honorable J. David Francis, Judge
No. 17191 and No. 17192

MEMORANDUM OPINION PER CURIAM—REVERSING

On January 31, 1978, this Court reversed Miller's conviction of first-degree assault and affirmed his conviction of first-degree robbery. On October 31, 1978, the Supreme Court of the United States vacated the first-degree robbery conviction and remanded the case to us for further consideration in light of Taylor v. Kentucky, 436 U. S. ——, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

An examination of the record discloses that Miller requested a presumption of innocence instruction in the manner prescribed by RCr 9.54. Consequently, our decision in Whorton v. Commonwealth, Ky., 570 S. W. 2d 627 (1978) is dispositive. Because a new trial is required, the attention of the trial judge is directed to RCr 9.56 (1978).

The judgment of conviction of first-degree robbery is reversed and the case is remanded to the Warren Circuit Court for a new trial on that charge.

All concur.

OPINION RENDERED: NOVEMBER 21, 1978

SUPREME COURT OF KENTUCKY

EDGAR GILBERT MILLER
v.
COMMONWEALTH OF KENTUCKY
} **File No. SC-410-MR**

Appeal From Warren Circuit Court
Action No. Ind. #17191 and #17192

MANDATE—Issued January 3, 1979

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

January 3, 1979 Appellee's Petition for Rehearing Denied.

A Copy - Attest:

(s) Martha Layne Collins, Clerk

Issued: January 3, 1979

SUPREME COURT OF KENTUCKY

SC-410-MR

EDGAR GILBERT MILLER - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Warren Circuit Court
Honorable J. David Francis, Judge
No. 17191 and No. 17192

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE—Entered February 2, 1979

Appellee's motion pursuant to CR 76.44(b) to stay the execution and enforcement of the mandate for a period of 90 days pending application for Writ of Certiorari to the United States Supreme Court is granted. The stay so granted is extended to and including May 3, 1979. Additional stays should be obtained from the United States Supreme Court.

Reed, Stephenson, Sternberg and Aker, JJ., sitting. All concur.

ENTERED February 2, 1979.

(s) John S. Palmore
Chief Justice

CITATIONS FROM UNITED STATES CONSTITUTION

515.020 Robbery in the first degree

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

(2) Robbery in the first degree is a Class B felony.

HISTORY: 1974 H 232, § 130, eff. 1-1-75

508.010 Assault in the first degree

(1) A person is guilty of assault in the first degree when:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

(2) Assault in the first degree is a Class B felony.

HISTORY: 1974 H 232, § 65, eff. 1-1-75

APPENDIX D

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MONA MILLER, having first been duly sworn on oath, was examined and testified as follows:

Direct Examination By Hon. Mike Caudill

Q. 1. Mrs. Miller, state your full name for the record, please.

A. I'm Mona C. Miller.

Q. 2. Where do you live, Mrs. Miller?

A. I live at Richardsville.

Q. 3. How long have you lived there?

A. About 19 years.

Q. 4. And who's your husband?

A. Clarence S. Miller.

Q. 5. Do you all have any children?

A. Yes, we have three.

Q. 6. What are their ages?

A. I have one boy that's 23, and one that's 18, and a little girl, 11.

Q. 7. Do you work, Mrs. Miller?

A. Not right now.

Q. 8. In December of 1976, were you working at that time?

A. Yes, I was.

Q. 9. Where were you working?

A. Secretary for the Sheet Metal Workers.

Q. 10. And what were your duties when you were there?

A. I, of course, wrote all letters from dictation,

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I did the payroll, I did the taxes, I took care of all the mail, and got the supplies for the office, and all of the duties of a secretary.

Q. 11. Did you fill out application cards for union members?

A. Yes, I did.

Q. 12. And did you also fill out beneficiary cards for union life insurance policies?

A. Actually, the members had to fill out the applications and the beneficiary cards themselves. I only helped them with that, I should say.

Q. 13. I show you a designation of beneficiary card which is marked as Commonwealth's Exhibit No. 11 and I ask you to examine it. First of all, explain to the jury exactly what that card means and what it is.

A. When a person becomes a member of Local 433, our international union, our international office out of Washington, D.C. has a $3,000 accidental insurance policy that is given to each person who becomes a member of our local 433, and so when they come into the office they are required to fill out a card designating who they would like to have as their beneficiary in case of the accidental death. Then this $3,000 policy would go to the beneficiary on this card.

Q. 14. Were you in the office when that card, Exhibit No. 11, was filled out?

A. Yes, I was.

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Q. 15. And when was that card filled out?

A. The date on this is October the 19, 1976.

By the Court: Let me remind—I have given Mr. Raines for the defendant who has objected to the introduction of each of these exhibits, and I have overruled him. Just for the record.

By Mr. Caudill:

Q. 16. All right. As to that particular card, did you put any of the writing on that card yourself?

A. No, I did not.

Q. 17. And would you explain to the jury who filled that card out and who signed?

A. Edgar Miller filled out this card and his signature is on this card.

Q. 18. Were you present when Edgar Miller signed that card and filled it out?

A. Yes, I was.

Q. 19. And do you see that person in the courtroom today, Mrs. Miller?

A. Yes, I do.

Q. 20. Would you point him out to the jury?

A. He's the man sitting at this table.

Q. 21. All right. Now, Mrs. Miller, what did you do with that card after he signed?

A. We have a file, a little card file that these go in, and this was placed in that file.

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Q. 22. And what do you remember about the day that this defendant came out and filled that card out? Tell what statements he made to you that day, if any.

A. Well, he, I asked him to fill out an application form to become a union member, and he was rather concerned about this. He could not understand why he had to fill this form out, and then I tried to explain to him why it was necessary that he fill the form out, and he did go ahead and fill it out.

Q. 23. All right. Did you notice anything particular about him on the day that he was out there filling that card out? Did his name in any way strike you as being unusual?

A. Well, simply because his last name was the same as my own, this brought—caused me to pay a little more attention to him. Also, his address was the same as my own, and this caused me to be curious as to where he might live out on this route.

Q. 24. When is the next time, if any, that you saw this man again after the time he filled that card out?

A. Approximately two to three weeks later, he came back to the office again.

Q. 25. Was he by himself when he came back two or three weeks later?

A. Yes, he was.

Q. 26. And what did he do and what did he say when

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he came back this time?

A. He asked if we had a credit union, and I told him no, and he wanted to know how many union members we had, and I told him, and then he went out the door.

Q. 27. Was there any other discussion?

A. Not at that time that I remember right now.

Q. 28. Your Honor, at this time, I would move to introduce the beneficiary card as Exhibit No. 11.

By the Court: It has been identified, so let it be offered in the evidence and exhibited to the jury.

By Mr. Caudill:

Q. 29. Mrs. Miller, on December 9, 1976, what time did you get up that morning?

A. Around five o'clock.

Q. 30. Was that a working day for you?

A. Yes, it was.

Q. 31. And what time did you have to be at work?

A. At 7:30.

Q. 32. How did you get to work that day?

A. I drove.

Q. 33. Was there anybody else at work when you arrived on that day?

A. No, there was not.

Q. 34. Was there anybody else in the office up about two o'clock besides yourself?

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A. Yes, my boss was in the office most of that day, Doug Watt, who's the business manager for the Sheet Metal Workers.

Q. 35. And how long was he there?

A. He was there most of the day. He left approximately at two o'clock. He had reports to fill out and was in the office most of that particular day.

Q. 36. Was anybody else there between the time of the robbery and the time your boss left?

A. No.

Q. 37. Tell the Jury in your own words exactly what happened on the date of the robbery and the time of the robbery.

A. I had gone into a small, little bathroom area to wash out the coffee pot. Suddenly, I felt that there was someone standing behind me, and I turned around with the coffee pot still in my hand, and there he was standing there with a gun pointed at my stomach.

Q. 38. Excuse me, now. Describe how he looked the first moment that you saw him.

A. He was wearing a hat, expensive looking sunglasses, a little Hitler-type moustache, and had on a tan coat.

Q. 39. Describe the color and the appearance of the moustache.

A. The moustache was a very short moustache that

was just under the nose, a Hitler-type, a very small one. It had blond hairs in it, and it did not look like a real moustache.

Q. 40. Were all the hairs the same color in it?

A. No, they were not. There were blond hairs in the moustache.

Q. 41. And what was the color of the moustache in general?

A. Sort of a light brown, but there were a lot of light hairs in the moustache, which made it stand out to me.

Q. 42. Did it appear to be a real moustache?

A. No, it did not.

Q. 43. And could you tell that from the first time you looked at it?

A. Yes.

Q. 44. What happened from the first moment that you saw him—What happened after that?

A. I turned around and saw him, and he was standing there with a gun pointed at me. He was very close to me. He wasn't touching me with the gun, but very close to me, and it frightened me so badly that I started screaming.

Q. 45. Did you know who he was at that point in time?

A. Yes, I did.

Q. 46. How long did it take you to figure out who he was?

A. I knew the instant I turned around and looked at him.

Q. 47. What happened after that?

A. After I screamed, he started beating me in the head with the pistol. He started beating me on the hand, on each of the hands just over and over and over and over and over.

Q. 48. Where were you when this beating was going on?

A. I was bent over, kind of between the commode and the lavatory.

Q. 49. How long did this go on?

A. For several seconds.

Q. 50. Would you tell us approximately how many blows he inflicted upon you at that time?

A. I don't really—I can't tell you. There was so many that I really can't tell you. He just kept on beating me in the head and on the hands over and over and over.

Q. 51. What was he beating you with?

A. With the pistol in his hands.

Q. 52. And would you describe this pistol?

A. It was a small pistol that fit in the palm of his hand, and he had it laid sideways, beating me with it, and it was either an old pistol or it had been used an awful lot because the blueing was well worn on it, and there was shiny places on the gun where the blueing had worn off.

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Q. 53. What happened after the beating there in the ladies restroom? Did he make any statements to you at that time?

A. Yes, he did. When I first—When he first started beating me, I was screaming, and he told me to shut up, and I was afraid not to shut up; afraid that he might kill me right there and then after I shut up, he was still beating me, and he began saying that, 'I want the money. Get me the money. I want all of the money you have.'

Q. 54. And where were you when he was saying this?

A. I was between the commode and the lavatory.

Q. 55. And what did you do after he said this?

A. After he stopped beating me, moved to the side of the door, and let me out, so I could go across the hall to the office.

Q. 56. As you walked out of the ladies restroom, where was he standing? Mrs. Miller, I want to show you Commonwealth Exhibit No. 1, and I want to turn it around here, and ask you if you can, to point out to the jury where you were while the beating was going on.

A. This is the commode and this is the lavatory, and I was right in this area while he was beating me over the head and on the hands.

Q. 57. And when you got up and walked out of the restroom, where was he standing?

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A. As best I remember, he moved back to what would have been the right-hand side, as I was coming out of the door.

Q. 58. And did he have his gun in his hands when you came out of the door?

A. As best I remember, he did.

Q. 59. And what hand did he carry his gun in.

A. I cannot be certain on this matter.

Q. 60. Do you remember whether or not the gun was pointed at you when you were walking out of the bathroom?

A. I'm sure that it was.

Q. 61. And were you walking in his direction when you were walking out of the bathroom?

A. No, I was walking toward the office across the hall.

Q. 62. All right, but as you walked out of the bathroom, was he in front of you?

A. No, he had moved back to the side because it was such a narrow area there that he had to move back to let me out.

Q. 63. And approximately how far away from him were you as you walked over to the union office?

A. Well, a very short distance because he was right behind me walking to the office.

Q. 64. What happened after you got into the office?

A. I went directly to the safe and got the money

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bag out of the safe and handed it to him.

Q. 65. Now, did he say anything to you between the time that you left the women's restroom and the time that you were in the office.

A. Not until after I handed him the money bag.

Q. 66. Now, I show you Exhibit No. 8. The testimony has been that that is where you all kept the money. Which drawer did you keep it in?

A. In the middle drawer of the safe.

Q. 67. Now, where was he standing when you were opening the middle drawer of the safe?

A. Back toward my desk.

Q. 68. And about how far was he from you when you handed him the bank bag?

A. Not over two or three steps.

Q. 69. Did you look at him when you handed him the bank bag?

A. Yes, I did.

Q. 70. Did you look at his face?

A. Yes, I did. I looked at him directly in the face.

Q. 71. I want you to look at this defendant in the courtroom here today. Is that the man that committed this armed robbery and assault upon you?

A. Yes, he is.

Q. 72. Do you have any doubt in your mind that he's the one?

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A. No. No doubt whatsoever.

Q. 73. What happened after you handed him the bank bag?

A. He told me then to get all the money out of my desk.

Q. 74. And did you go to the desk?

A. I told him that I had no money in the desk.

Q. 75. What happened next?

A. Then he told me to turn around and he struck me again with the gun on the back of—at the base of the skull, a very hard blow, and then he told me to lie on the floor, which I did.

Q. 76. Do you know how—Did he say anything else to you before he left?

A. When he told me to lie on the floor, he told me not to move or he would kill me, and he kept saying this over and over and over as he left the building—'If you move, I'll kill you. Don't you move, or I'll kill you,' and he kept saying this over and over until he left.

Q. 77. Do you know if he went out the back or the front door?

A. No, I do not know which door he went out.

Q. 78. From the first moment that you saw him that day, when you saw him for the first time in the women's restroom, what was the—Or why was it that you remembered who he was?

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A. Because the two previous times that he had been in the office, he always had a very neat appearance. He had it the same day. He was very neat and clean in his appearance. This had attracted by attention because he was noticably neat in his appearance.

Q. 79. Is there anything else that would make you remember this man?

A. Everybody carries their body in a particular way—they hold their head in a particular way. This man was very straight and erect, and these were just things that I noticed.

Q. 80. What did you do after he left?

A. I laid on the floor for several seconds because I did not hear him leave the building, and I was afraid to move since he had threatened to kill me, until I was sure that he had had time to get away and when I was sure that he had had time to get away, then I got up and got to the telephone and started making calls.

Q. 81. And who did you call?

A. I tried to reach my boss at one of the lawyer's offices first, and he was not there. Then I tried to reach the people in the next office, next to me, which was M. C. Hinton, and they didn't answer, and then I called Detrex, where my husband works, and I asked for them to get him immediately.

Q. 82. Who was the first one to arrive there?

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A. My husband, Clarence.

Q. 83. Did you tell your husband when he arrived who had assaulted you and robbed you?

A. Yes, I did.

Q. 84. Did you tell him his name?

A. Yes, I did.

Q. 85. How did you know his name?

A. Because of the two previous times that he had been in the office and by him filling out the forms that were required for him to become a union member, and this is how I knew his name.

Q. 86. Did you give a description of this man to your husband?

A. Yes.

Q. 87. And what description did you give right after it happened?

A. Told him that he was approximately six feet tall, that he had dark hair, that he had on a tan coat and a hat and sunglasses, and a moustache.

Q. 88. Did you tell him about the moustache?

A. Yes, I did.

Q. 89. What did you tell him?

A. I told him that it was a Hitler-type moustache that he had that was short, right under the nose, and that it had blond hair in it and that I thought at the time there was something funny because it didn't match the hair on his head.

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Q. 90. Mrs. Miller, I want to show you what has been marked as Commonwealth Exhibit No. 3, and first of all, tell us what that exhibit is.

A. This is my wedding band.

Q. 91. And was it on you during this robbery?

A. Yes, it was.

Q. 92. Was it on you the whole time?

A. Yes, it was.

Q. 93. Now, I direct your attention to what looks like a dent mark in your wedding band. Was that there before the robbery?

A. No, my wedding band was just like new. I had always been very proud of it, and there was not a scratch or a mark on it anywhere before the robbery.

Q. 94. And what did you do with that after the robbery?

A. My fingers were beginning to swell to such a point that I knew that I was going to have to get the ring off, and so I took it off my hand, off my fingers.

Q. 95. Did you give it to anybody in particular?

A. I gave it to Clarence.

Q. 96. Does it look the same way now as it looked right after the robbery?

A. Yes, it does.

Q. 97. Now I show you Exhibit No. 4 and I direct the same questions to you as to that exhibit. Is that your watch?

A. Yes.

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Q. 98. Did you have it on during the robbery?

A. Yes, I did.

Q. 99. And it's—Is it in the same condition now as it was in immediately after the robbery?

A. Yes, it is. Exactly.

Q. 100. And what did you do with it?

A. I took it off and also gave it to Clarence.

Q. 101. Mrs. Miller, describe your injuries, describe your injuries that you sustained on the day of the robbery.

By Mr. Raines: Objection.

By The Court: You gentlemen approach the bench, please. Out of the Jury's Hearing at Bench:

Now, it's my understanding that you all have stipulated that Mrs. Miller sustained in the assault and robbery a

serious physical injury. That doesn't mean you're entitled to put in some evidence regarding the injury. It means that it's limited to some extent and the stipulation removes an amount of proof, but I don't want you to be misled—that by a stipulation, it means that it's not allowed, but I will limit it somewhat, and isn't now the proper time to advise the jury that you have agreed into a stipulation?

Before the Jury, By the Court:

Ladies and gentlemen, follow me very, very carefully now. The Commonwealth attorney and defense

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attorney have agreed, what might be called a stipulation for me to advise you that it's agreed between the parties that any assault and robbery that Mrs. Miller sustained, that is, she received a serious physical injury as a result of this assault and robbery. All right, now you may proceed.

By Mr. Caudill:

Q. 102. As to the amount of force that was used on you during this robbery, what happened to your hands?

A. They were broken and cut severely.

Q. 103. Both of them?

A. Both of them. I have one crushed finger on my right hand.

Q. 104. As to the force that was used during this robbery, what injury did you sustain to your head and where on your head was that injury sustained?

A. There were cuts on each side of the head at the top that required stitches. There was a very large knot caused by a blow on the back of the head from the gun.

Q. 105. How long were you in the hospital, Mrs. Miller?

A. Ten days.

Q. 106. Have you ever seen this defendant driving an automobile?

A. Yes, I have.

Q. 107. And when did you see him driving that automobile?

A. The second time that he came to the office, I

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was leaving the office to go to lunch, and I had to come downtown to the Post Office and come to the bank and he left just ahead of me in his car, and I followed him all the way down to Tenth Street from the Russellville Road in my car.

Q. 108. Describe the car that he was in to the best of your ability.

A. It was a solid white Cadillac, and it had a red bumper sticker on the back of it which had the lettering, something, I do not remember the wording, but something that was uncomplimentary to a man's wife.

Q. 109. Now, Mrs. Miller, I show you two photographs which have been marked for identification purposes as Exhibits No. 12 and No. 13, and as to Exhibit No. 12, I direct your attention to the bumper sticker on the back of that white Cadillac. Can you identify that?

A. The car that he was driving looks like this, and there was a bumper sticker on the back of it like this one.

Q. 110. Did you have an occasion to see the front of that car at any time or particularly notice the front of the automobile?

A. No, I did not.

Q. 111. Exhibit No. 12, on the back of the automobile, and Exhibit No. 13 was the front. Now, Ma'am, I direct your attention to both exhibits, Nos. 12 and 13, and

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ask you if this appears to be the type of automobile that he was driving.

A. It does.

Q. 112. Have you ever viewed a photographic line-up in regard to this robbery and assault?

A. Yes, I have.

Q. 113. And when and where did this photographic line-up take place?

A. In my home, I believe it was Thursday of last week.

Q. 114. And who displayed the photographs to you at that time?

A. You did.

Q. 115. And approximately how many photographs did you view?

A. Approximately six to eight photos.

Q. 116. Would you explain to the Court and the jury how I showed you these photographs.

A. You laid them all out on a table and asked me to—If I recognized anyone.

Q. 117. Did I do anything to suggest any particular photograph over that of any other?

A. No, you did not.

Q. 118. How long did you look at them before you picked the photograph out?

A. Approximately 15 seconds.

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Q. 119. Now, Mrs. Miller, I show you exhibits that have been marked 14 through 19, and I'm going to lay these out in front of you and ask you if these are the same photographs that I showed you on that date?

A. Yes, they are.

Q. 120. Did you pick out more than one photograph?

A. No, I did not.

Q. 121. Which one did you pick out?

A. This one.

Q. 122. Exhibit No. 19. When you viewed these photographs, did you have any doubt in your mind that this was a photograph of the person that robbed you, and assaulted you on that date?

A. No, I did not.

Q. 123. Do you have any doubt today?

A. No, I do not.

Q. 124. I move to introduce these exhibits—14 through 19, Your Honor.

By The Court: All right. They all have been identified and may be offered in the evidence and exhibited to the jury.

By Mr. Caudill: And would like the record to show that Exhibit No. 19 is a photograph of the defendant.

By the Court: All right.

By Mr. Caudill:

Q. 125. Did you ever notice anything peculiar about

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this defendant's address when he applied for membership to the union?

A. I noticed that he had the same address as I did of Route 10.

Q. 126. Did you know him prior to this time or prior to the first time you saw him at the union office?

A. No.

Q. 127. Had you ever seen him before that time?

A. No, I had not.

Q. 128. Mrs. Miller, you realize the importance of your identification in this case, don't you?

A. Yes, I do.

Q. 129. And do you realize the consequences of your identification.

A. Yes, I do.

Q. 130. I will pass the witness.

By the Court: Gentlemen, would this be a good time to break for lunch?

By Mr. Raines: May we approach the bench?

By the Court, out of Jury's hearing:

Gentlemen of the Bar, I want you back in my office at a quarter of one. Before the Jury:

Ladies and gentlemen, we're going to break now for lunch, and we'll adjourn until one o'clock. Now, while you're in adjournment for lunch, I will admonish you again —Don't let anyone speak with you

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about the case, don't you speak with each other about it, don't think about it or consider it, and of course, don't make up your minds about it until it's finally submitted to you. You may be released until one o'clock.

After Lunch Break, In Chambers:

EDGAR GILBERT MILLER, having first been duly sworn on oath, was examined and testified as follows:

By Mr. Caudill:

Q. Mr. Miller, I have in front of me an F.B.I. record sheet on you, and if you please answer the following questions. Is it true that in 1954, you were convicted of two counts of armed robbery and given seven years on each count to run concurrently?

A. I was under the impression—Yes, Sir, to run concurrently, yes, Sir.

Q. Now, Sir, is it also true that in 1960—Now, let's see, the armed robbery convictions were in New Orleans?

A. Yes, Sir.

Q. Is it also true that in 1960, you were convicted of the crime of forgery and given from two and a half to five years in the Colorado State Prison?

A. Yes, Sir.

Q. And was that conviction in Boulder, Colorado?

A. Yes, Sir.

Q. Now, Sir, in 1964, is it true that you were

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convicted of assault to rape and burglary?

By the Court: Only question is burglary.

By Mr. Caudill: I know, Judge. I'm trying to figure

out this? Were you convicted of burglary in 1964 in Colorado?

A. The Judge reprimanded the jury, Your Honor. He said that the case was—In other words, the Judge didn't go forth. The jury brought in a verdict of guilty. He suspended the sentence. That's what he told me.

By the Court: You were convicted by the jury?

A. Yes, Sir, but I would like to interject that he didn't feed that I was guilty of it any more than I did.

By the Court: Let me be sure I understand it. You were convicted of it?

A. Yes, Sir.

By the Court: But the Judge suspended the sentence?

A. Yes, Sir.

By Mr. Caudill:

Q. All right. Is it true that in 1965, you were convicted again in Denver, Colorado of robbery of a savings and loan association and given eight years?

A. Yes, Sir.

Q. And that is in Denver, Colorado, also?

A. Yes, Sir.

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Q. Do you have any other robbery convictions since that time, Sir?

A. Not at all other than that three counts of armed robbery in Denver on that last one that you just read.

Q. Three counts?

A. Yes, Sir, three counts.

Q. In 1965?

A. Yes, Sir.

Q. And you got eight years on each count?

A. Yes, Sir.

Q. And was that a concurrent running sentence?

A. Yes, Sir.

Q. All right, Sir. That's all I have.

By the Court: Okay, I'll let you admit it on the first one, which was armed robbery in New Orleans.

By Mr. Caudill: Two counts.

By the Court: The bank robbery, the burglary, but not the assault to commit rape.

By Mr. Caudill: You left out forgery.

By the Court: And the forgery.

By Mr. Caudill: In 1960. He admitted he was convicted of forgery.

By the Court: All right, and then armed robbery.

By Mr. Caudill: Three counts of armed robbery in 1965.

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By the Court: But in none of those—and I'll hear you on this, but in none of those I don't think it's proper to read the sentence.

By Mr. Caudill: Well, I won't read the sentence.

By the Court: Or the number of counts.

By Mr. Caudill: I think the number of counts are relevant just as if it had been two armed robberies.

By the Court: I think you're right about that, but I won't read the sentences, except if you want to give that one on the suspended sentence, why—

By Mr. Caudill: I think that when he answers that, Judge, he could explain that it was a suspended sentence.

By Mr. Raines: You will not mention the sentences?

By Mr. Caudill: I will not mention any of the sentences. I will mention the counts, and I will mention where they are from.

By Mr. Raines: All right.

By the Court: You be careful on that one because that burglary and rape are probably read together.

All Parties moved into Open Court, and Mrs. Mona Miller resumes the witness stand:

By the Court: You're under the same oath, Mrs. Miller.

All right. You had closed your examination Mr. Caudill?

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By Mr. Caudill: I have closed my direct.

By the Court: Mr. Raines?

Cross-examination by Hon. Murry Raines

Q. 1. Mrs. Miller, I'm going to ask you a few questions now. If, at any time during the course of this, you get upset or you want to take a recess or something, you just stop me, and we'll stop right there, okay, Ma'am?

A. All right.

Q. 2. Mrs. Miller, I'd like to ask you to reflect back to the first time that you saw the person who assaulted you, and tell the jury what that person looked like with regard to clothes he had on, facial features and other physical features as well as you can in your own independent memory.

A. Are you asking me to tell the first time I ever saw the person or the day he assaulted me?

Q. 3. The first time you saw the person who assaulted you on December the 9th.

A. All right, on December the 9th, the man was wearing a hat, expensive-looking sunglasses, a Hitler-type moustache right under the nose, and a tan jacket.

By the Court: Excuse me just one moment.

By Mr. Raines:

Q. 4. Mrs. Miller, do you recall what color the hat was and what it looked like?

A. I recall it was light colored, something of—

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the best I remember, a style sort of, the style of a rain hat, but other than that, I can't give you any description of it.

Q. 5. And you believe—you stated that this person had on a coat?

A. That's correct.

Q. 6. All right, Ma'am, what color was that and what did it look like?

A. It was a light tan coat.

Q. 7. Was it like a sports jacket?

A. Not dressy—it was more the type that you would wear, you know, for like to go to ballgames or something like that. Not a dressy sport.

Q. 8. Do you recall what color the trousers were that this person had on?

A. No, I don't.

Q. 9. Do you recall what kind of shirt he had on?

A. The coat was closed all the way to the neckline so I could not see.

Q. 10. In other words, the top button of the coat was closed?

A. There was no button that—I believe there was a zipper, but no button.

Q. 11. Mrs. Miller, what color was this person's hair?

A. He has dark hair—very dark hair.

Q. 12. How long was it?

A. About the length he has it now.

Q. 13. If I am—Correct me if I'm wrong, but I believe you stated on direct examination that the person who assaulted you hair was over his ears, is that not correct?

A. No, I did not state that.

Q. 14. You did not state that?

A. No, I did not.

Q. 15. Do you remember what the color of this persons eyes were?

A. No.

Q. 16. Do you remember whether or not this person had any distinguishing marks on his face?

A. No.

Q. 17. You stated that this person was wearing sunglasses, is that correct?

A. That's correct.

Q. 18. Could you tell whether or not they were prescription or did they just look like dime store?

A. No, they looked to be expensive, but I could not tell you whether they were prescription glasses or not.

Q. 19. All right, Ma'am, now, I believe you stated that this person had on a moustache. Was there any other facial hair that you can recall?

A. You mean such as a beard or—

Q. 19a. Yes, Ma'am.

A. No. No, he was clean-cut except for the Hitler

moustache.

Q. 20. Was he clean-shaven?

A. That's correct.

Q. 21. There was no beard stubble or anything like that, Ma'am?

A. No.

Q. 22. And I believe you stated that this person was about six feet in height is that correct?

A. That's correct.

Q. 23. And looked to weigh about 200 pounds or more?

A. Approximately so.

Q. 24. Mrs. Miller, was this person wearing gloves?

A. No, he was not.

Q. 25. On either hand?

A. No.

Q. 26. Mrs. Miller, can you recall any other distinguishing features of this person on December the 9th after you first saw him when he first came in the office at the times that you looked at him after that—from your recollection.

A. Not that I recall at the moment.

Q. 27. So the way you described him initially there would be no change from any further observation other than what you had on that day?

A. No.

Q. 28. Mrs. Miller, do you wear glasses?

A. Yes, I do, but only for close work.

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Q. 29. Did you have them on at the time this happened?

A. No.

Q. 30. What had you been doing right before this person came into the office.

A. I had started typing some material that my boss had left and had requested me to get complete for him before the end of the day.

Q. 31. All right, Ma'am. Do you wear your glasses when you do typing?

A. That's correct—for close work only.

Q. 32. Had you taken your glasses off when you finished your typing and went back to tend to the coffee pot—I believe you said?

A. That's correct.

Q. 33. Mrs. Miller, you testified that it's your belief that the moustache that this person was wearing was a fake one, it that correct?

A. That's correct.

Q. 34. Was any part of the moustache sticking out?

A. It was just like I told you it was. It was just a very short moustache, a Hitler-type with the blond hairs. I noticed those more about it than anything else.

Q. 35. Was it completely blonde?

A. No, there was some hairs that were darker, but the blond hairs stood ont in my mind.

Q. 36. Was it predominantly dark, then?

A. No.

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Q. 37. Let me ask you—Were most of the hairs in the moustache dark or light?

A. There was about half and half.

Q. 38. When you talked about light, they could have been gray, is that right?

A. No, blond.

Q. 39. Not gray?

A. Not gray.

Q. 40. Mrs. Miller, when did you first come to the conclusion that this moustache was a fake one.

A. When I handed him the money bag.

Q. 41. Are you thinking about this man has on a fake moustache when that was happening?

A. That's after—When I handed him the money bag that thought had occurred to me, yes.

Q. 42. Mrs. Miller I know it's difficult to remember details like this when something like this has happened to you, but I would ask you to honestly reflect and consider whether or not you did form this opinion about the moustache at some time after December the 9th?

A. No, I did not.

Q. 43. You're sure about that?

A. I am—positively.

Q. 44. Does your husband wear a moustache, Mrs. Miller?

A. No.

Q. 45. He does not?

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A. No.

Q. 46. Any other members of your family wear one?

A. My oldest son.

Q. 47. Does he live at home with you?

A. No, he does not.

Q. 48. Have you ever seen any other person wearing a fake moustache?

A. No.

Q. 49. Have you ever seen a fake moustache off?

A. No.

Q. 50. Mrs. Miller, I believe you testified about a designation of beneficiary card that Edgar Miller was supposed to have filled out at your union office, and the date on that card is October 19, 1976.

A. That's correct.

Q. 51. Did anybody in your office fill that in or is that filled in by Mr. Miller?

A. He filled all of that in by himself.

Q. 52. I believe you stated that after October 19, 1976 Mr. Miller came into the office again, is that right?

A. That's correct.

Q. 53. Do you remember when that was?

A. Approximately two to three weeks later.

Q. 54. Approximately two to three weeks later, so that would have been some time in the first of November, is that right?

A. I believe so.

Q. 55. Have you ever talked to Mr. Miller over the telephone at any time?

A. No.

Q. 56. No time whatsoever?

A. No.

Q. 57. Either before December 9th or after?

A. No.

Q. 58. You're absolutely positive that he was in the union office on two occasions—once on October the 19th and some time, two or three weeks later than that?

A. Absolutely sure.

Q. 59. Could not be mistaken about that?

A. No, I could not.

Q. 60. Mrs. Miller, the first time that Edgar Miller was in the union office was October the 19th, 1976. Do you recall what he was wearing on that day?

A. No, I do not.

Q. 61. Had you ever seen him before that time?

A. No.

Q. 62. If I understand correctly, the testimony has been given so far by you and your husband as well that Edgar Miller and his family lived in the Richardsville community where you do?

A. That's correct.

Q. 63. Had you ever seen he or his wife or daughter before December 9, 1976?

A. No, I had not.

Q. 64. The first time that Edgar Miller came into the union office, do you recall how long he was in there?

A. Well, it was necessary for him to fill out forms, so approximately 15 to 20 minutes, I would say. That is only an approximate guess.

Q. 65. Did you testify correctly—If I'm wrong, correct me about this, but you were the one that provided him with those forms?

A. That's correct.

Q. 66. Did you stand in close proximity to him during the time he was filling that out?

A. He sat across from me, in front of my desk, across the desk from me.

Q. 67. And you said he was there about 10 or 15 minutes?

A. No, I said about 15 or 20 minutes, approximately.

Q. 68. I'm sorry. How about the second time he came in. Do you recall how long he was there that time?

A. Only for maybe five minutes. No more.

Q. 69. I believe you stated that the second time he was there you saw that he was driving a white Cadillac that had the bumper sticker on it?

A. That's correct.

Q. 70. How did you observe that, Mrs. Miller? Did you see out the window or what?

A. No.

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Q. 71. Okay, tell the jury how you observed his car.

A. All right. I was going to lunch, and I went out the door right behind him. He got in his car first and left, and it was necessary for me to come to the Post Office, and the bank, and I followed him in off the Russellville Road and came down Kentucky Street, and I came down Kentucky Street behind him, and I turned at Tenth and came up and turned and went to the Post Office.

Q. 72. All right, Ma'am, did you see him get into the car?

A. No.

Q. 73. Okay, you said you were following?

A. That's correct.

Q. 74. How did you know that that was Edgar Miller who was in the car in front of you if you didn't see him get in the car?

A. Because I could by his appearance.

Q. 75. Through his back window and at the back of his head?

A. I was that close to the car at all times, and there was no doubt in my mind that it was him.

Q. 76. Any particular reason that you were driving that close to his car?

A. No, he was driving slow, and I was in a hurry to get to the Post Office and the bank.

Q. 77. Mrs. Miller, I believe you testified that the

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car that you saw had a red bumper sticker on it, is that right?

A. It at least had red in it and some lettering.

Q. 78. Okay, Ma'am, I believe you testified that it was a red bumper sticker, isn't that correct?

A. I believe so.

Q. 79. Okay, Ma'am, I'd ask you to look at Commonwealth Exhibit No. 12 and tell me whether or not that bumper sticker is red.

A. There's red lettering on it.

Q. 80. I see that, but is the bumper sticker red?

A. The background is not.

Q. 81. Mrs. Miller, and I just frankly don't remember from your testimony before; who was the first person that you told that the man who assaulted you was Edgar Miller?

A. My husband.

Q. 82. And when and where was that?

A. While I was still at the office.

Q. 83. Who did you tell who it was after that?

A. Detective Raymond Raymer at the hospital.

Q. 84. Mrs. Miller, on the two occasions that Edgar Miller was supposed to have come to the union office, was there anyone with him on either of those occasions?

A. No.

Q. 85. No one at all?

A. At least not—They did not come in the office, I'll put it that way.

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Q. 86. And you observed him at all times while he was in the office on those two occasions, is that right?

A. That's correct.

Q. 87. And nobody was in there with him?

A. That's correct.

Q. 88. You're sure about that?

A. I'm positive.

Q. 89. Mrs. Miller, when this person came in the office on December 9, 1976, and you first became aware that you were to be the victim of a robbery, what was your first reaction?

A. When I turned around and saw him standing there with the gun pointed at me, I began screaming.

Q. 90. I guess it goes without saying that you were afraid then?

A. That's correct.

Q. 91. And that you were under extreme emotional distress, fear for your life?

A. I was afraid, yes.

Q. 92. Mrs. Miller, I believe you testified that the person who assaulted and robbed you, that you saw his face twice during the course of the commission of that crime, is that right?—Got a good look at it?

A. During the time of the robbery, is that what you're saying?

Q. 92a. Yes, Ma'am.

A. Yes, that's correct.

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Q. 93. And how long did those two occasions take to occur? In other words, did you look at him for two or three seconds or half a minute?—Longer or shorter?

A. Well, of course, it would be impossible for me to give you an exact time.

Q. 93a. I realize that.

A. The first time, I only glanced at him for, perhaps, five or ten seconds.

Q. 94. All right, Ma'am, and what position were you in and what position was he in? In other words, were you both standing the first time?

A. Right.

Q. 95. What about the second time?

A. We were both standing the second time.

Q. 96. How far away from him were you?

A. The first time or the second time?

Q. 96a. Both.

A. The first time, he could not have been more than two steps away from me pointing the gun at me. When I handed him the bank bag, he was, perhaps, two or three steps away from me.

Q. 97. Okay, Mrs. Miller, so we don't have any difficulty understanding this, two or three steps, would those be your steps or my steps? I'm about six feet tall.

A. My steps.

Q. 98. All right, Mrs. Miller, you said that this person

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was wearing a hat and was wearing sunglasses and he was wearing a moustache and all of those items cover either face or head, is that not correct?

A. The hat doesn't completely cover your head.

Q. 99. Well, did this hat?

A. Only the top.

Q. 100. So if this person was wearing sunglasses—were they dark or light?

A. They were light; you could see through them.

Q. 101. Could you tell what color the eyes were?

A. No.

Q. 102. Could you see the eyes?

A. Yes, I could see his eyes, but I was terribly upset and didn't notice the color.

Q. 103. You could not see them as clearly as if he weren't wearing sunglasses?

A. That's correct.

Q. 104. On either one of the two occasions that Edgar Miller came into your office prior to December 9, 1976, had he ever worn a hat?

A. No.

Q. 105. Had he ever worn sunglasses?

A. No.

Q. 106. Had he ever had a moustache?

A. No, he did not.

Q. 107. Mrs. Miller, the office that you work in is one in which a good deal of people come in and out of every

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day. Would not that be a fair statement, Ma'am?

A. That's correct.

Q. 108. How long have you worked there?

A. It would have been three years in March.

Q. 109. All right, Ma'am. Could you hazard a guess as to how many people come in and out of that office on a daily basis during that two or three year period that you have worked there?

A. Well, of course, on the days that the union meetings were scheduled, then there would be, like probably 50 to 75 people depending on the union meeting and what they were meeting about. On days that there were no particular meetings scheduled and then there would be a lot less people that would come in and out, but it would be perhaps ten or fifteen.

Q. 110. Okay, Ma'am, so somewhere between ten and fifteen and maybe 75 in a day?

A. Right, depending on the occasion.

Q. 111. Had there ever been anybody else come in there that you knew by the name of Miller?

A. Not that I knew, no.

Q. 112. Anybody that had filled out an application or whatever you fill out at union headquarters who was a Miller?

A. Not that had filled out applications that I can recall at this moment; I will put it that way.

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Q. 113. Yes, Ma'am. Mrs. Miller, if you can recall, and I know it would be difficult, how much time elapsed from the time this person first walked in on December the 9th from the time he left?

A. Approximately ten to fifteen minutes.

Q. 114. Ten to fifteen minutes?

A. Approximately.

Q. 115. And during that time you got a look at him twice?

A. That's correct.

Q. 116. For a few seconds or more?

A. That's correct.

Q. 117. Mrs. Miller, I don't want you to overly flatter me now, but I'm going to ask you if you can tell what height I am and how much I weigh. Don't be too nice.

A. I could not give you your exact height or exact weight. I could only give you an approximation.

Q. 118. I will ask you to guess.

A. Well, I would say you were six feet or perhaps a little less because you do have on high—a high-heeled shoe. I would say probably your weight would range from around 175 to 180.

Q. 119. Would you be amazed if I told you I was 6'2"?

A. No, I would not because I'm not good at guessing weights or heights.

Q. 120. Mrs. Miller, in all honesty, human beings are subject to frailities, one of which is under circumstances

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of extreme emotional and physical stress; our powers of observation and judgment are effected. Is that not correct. Would you not accept that as a general statement?

A. Mine were not.

Q. 121. That's not the question I asked you, Mrs. Miller. Would you not accept that as a general statement?

By Mr. Caudill: Your Honor, I don't think that Mrs. Miller is competent to testify as to what the general statement would be. I think she's only competent to testify what her observations were on that occasion. I object.

By the Court: I'm going to sustain that objection. I think it's argumentative.

By Mr. Raines:

Q. 122. Mrs. Miller, at the time this assault and robbery took place, you were afraid, weren't you?

A. Yes, Sir, I was.

Q. 123. You were scared for your life, weren't you?

A. Yes, I was.

Q. 124. I would ask you if you are as sure about your

belief that Edgar Miller committed these crimes as you are about the other things to which you have testified?

A. There's no doubt in my mind that he's the guilty one. There has never been any doubt in my mind but what he was guilty of this.

Q. 125. The other things you have testified about today

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about Mr. Miller coming into the office, the car, and that sort of thing, you're just as sure about those things, are you not?

A. That's correct.

By Mr. Raines: That's all I have.

Re-Direct Examination By Hon. Mike Caudill:

Q. 1. Mrs. Miller, you testified that this defendant didn't have on a hat or a moustache or sunglasses when he came in the union office prior to the robbery, did you not?

A. That's correct.

Q. 2. Of course, he would have no reason to conceal his identity on those occasions?

By Mr. Raines: Objection.

By the Court: Sustain the objection.

By Mr. Caudill:

Q. 3. How many people come in the union office with the name Miller?

A. Well, of course, there are other members who—people who are already members whose name is Miller. Right now, I could not tell you exactly, but there are very few in the area.

Q. 4. And how many, approximately if you know, would come in with the name Miller with the same rural route as you live on?

A. I don't believe there are any others. That is, other than my husband.

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Q. 5. Is there a light in the ladies room?

A. Yes, there is.

Q. 6. And where is that light?

A. I believe it was up over the lavatory if I remember correctly.

Q. 7. Was it on when this man accosted you?

A. Yes, it was.

Q. 8. Now, I believe that probably the first time you have ever seen me was last week?

A. That's correct.

Q. 9. Would you need your glasses to recognize me again if you saw me again a few days later?

A. If I had my glasses on, I could not see you. My glasses are only for close work and nothing else. That is all they are designed for is close work.

Q. 10. Was there a light in the union office?

A. Yes.

Q. 11. And where is that light?

A. Well, one of the lights is right over my desk. There are large areas that are lighted and then there's another at the back of my desk, so the room is well-lighted.

Q. 12. And your desk is approximately how many feet from the safe?

A. Perhaps two or three feet.

Q. 13. And was this light on during the robbery?

A. That's correct—All lights were on.

Q. 14. How much money was taken during this robbery,

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and what was taken exactly?

A. There was approximately $15.00 in cash. There was a large number of checks, perhaps $1,000 to $2,000 worth of checks. There were three rolls of $.13 stamps that had not been opened that I had purchased the day before that were also taken. There were deposit slips also in the bank bag that were taken.

Q. 15. Did you give anybody permission to take these things?

A. No, I did not.

Q. 16. Do you remember when the first time was that you told me about this bumper sticker on the automobile?

A. I believe it was in my home.

Q. 17. Now, had I shown you any photographs of the automobile prior to the time that you told me about it?

A. No.

Q. 18. And did you at that time explain to me that some of the wording on the bumper sticker had two do with impeaching somebody's wife?

A. Somebody to do uncomplimentary things to someone's wife. That's correct.

Q. 19. And did you also tell me that it was red?

A. There was red in it, yes.

Q. 20. When you were in the bathroom prior to this robbery, did you notice any .25 caliber bullets in the coffee pot?

A. No, Sir, I did not.

Q. 21. Or in the top of the coffee pot?

A. No, Sir, I did not.

Q. 22. Did you notice any on the floor next to the door?

A. No, I did not.

Q. 23. Is this exclusively a women's restroom?

A. The one I was in, yes.

Q. 24. Are you afraid now, Mrs. Miller?

A. Yes, I am.

Q. 25. Were you—Will you ever forget the man's face that robbed you that day?

A. I never will forget it as long as I live.

By Mr. Caudill: That's all I have.

By Mr. Raines, Re-cross examination

Q. 1. Mrs. Miller, when you say you use your glasses for close work, would you call close work something within two or three steps?

A. I would call close work the typing that I would have on my desk next to a typewriter.

Q. 2. As far as the typewriter is away from your face?

A. Maybe 12, 14 inches—something like that.

Q. 3. How tall are you, Mrs. Miller?

A. I'm five three and a half.

Q. 4. And the typewriter is only 12 inches away from your face?

A. Twelve to 14 inches, I'd say, approximately.

By Mr. Raines: That's all.

TRANSCRIPT OF THE PROCEEDINGS TENDERED INSTRUCTIONS BY DEFENDANT—REFUSED

You are instructed that the Defendant, Edgar Gilbert Miller, is presumed to be innocent until the contrary is proved beyond a reasonable doubt. This presumption carries the force of law and can only be controverted by evidence which leaves the mind of each juror in that condition that he can say that he feels an abiding conviction, to a moral certainty, that the Defendant is guilty of each element of the offense charged.

You are further instructed that this standard of reasonable doubt applies to each element of the offense charged; therefore, you must acquit the Defendant, Edgar Gilbert Miller, unless you find beyond a reasonable doubt that the evidence actually introduced proves each element of the offense with which he is charged.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A de-

fendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence (T.R., p. 34).

The Instruction Given by the Court Was As Follows:

The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty (T.R., p. 33).